



DEPARTMENT OF THE NAVY

COMMANDER
NAVY REGION, MID-ATLANTIC
1510 GILBERT ST.
NORFOLK, VA 23511-2737

IN REPLY REFER TO:

5090

EVN40/09/RE237

APR 30 2013

Mr. Brian Van Wye
Natural Resources Administration
1200 First Street, NE, Fifth Floor
Washington, D.C. 20002

Dear Mr. Van Wye:

SUBJECT: REVISED STORMWATER RULE COMMENTS

As the Department of Defense (DoD) Regional Environmental Coordinator (REC) for U.S. Environmental Protection Agency (EPA) Region III and on behalf of all of the military services, Commander, Navy Region Mid-Atlantic is responsible for coordinating responses to various environmental policies or regulatory matters of interest. We commend the District of Columbia for addressing various concerns of the regulated community in this latest draft by incorporating revisions that provide additional flexibility/options for development while still protecting and/or improving the environment and District of Columbia waters. Once again, we appreciate the opportunity, as part of the regulated community, to comment on these latest revisions to the District of Columbia's stormwater rules. Our comments are enclosed.

We would also like to point out the following. Several of our previous comments in a letter dated Nov 8, 2012 were not addressed and are repeated within the enclosure. Two concerns are unique to federal entities; first, the inability to file a covenant or easement regarding federal property without congressional approval and second, the transition to full effectiveness of the stormwater management performance requirements proposed in the Request for Input, does not accommodate the federal budget process where funding must be programed several years in advance.

If you have any questions, my points of contact for this matter are Lieutenant Commander Mark Nevitt, JAGC, U.S. Navy at mark.nevitt@navy.mil, telephone (757)322-2938 and Mr. Will Bullard at william.bullard@navy.mil, telephone (757) 341-0429.

Sincerely,

CHRISTINE H. PORTER
Director for Regional
Environmental Coordination
By direction of the Commander

Enclosure

Copy to: U.S. Army REC, Region III (Ms. Amy Alton)
U.S. Air Force REC, Regions I, III (Mr. Ron Joyner)

**Department of Defense Comments to the District of Columbia
Stormwater Management, and Soil and Sediment Control Proposed
Rulemaking**

PREAMBLE - PROPOSED TRANSITION TO FULL EFFECTIVENESS

Pages 7-8: DDOE recognizes the need for some exceptions to the general rule that the timing of each phase is relative to a major regulated project's submittal of a SWPPP. Two exceptions are meant to avoid significant redesign costs, delays, the need to reapply for approval, or the need to go through the construction of stormwater infrastructure multiple times for the same site or portions of a site. One exception is for projects that have submitted detailed design work required for a Stage 2 or Consolidated Planned Unit Development (PUD) application.

Comment: The federal government does not have to submit PUD plans to the zoning commission, so it is unclear how an exception would be made to prevent significant redesign costs for federal agencies, particularly where appropriated funds have been committed to the initial design for a project.

Recommendation: Provide an alternate progress stage for federal projects that would allow a similar exception. This might be at the point of approval by the National Capital Planning Commission, 35% design stage or some other mutually agreeable point in the federal planning/design process.

PREVENTION OF POLLUTION BY WATERCRAFT

508.2: Each marina, dock, or basin where a vessel or other watercraft is berthed shall be provided with water closets, urinals, and lavatories which are separate for each sex, readily available, and in sufficient numbers to meet the needs of persons using the marina facilities.

Comment: DOD facilities, particularly Navy, have docks and piers for military operations and not for public use. DOD facilities can also have Marinas that are not generally open to the public. The sanitary facilities serving these areas meet DOD standards for the mission support they provide.

Recommendation: Add a subsection to section 508 stating "the provisions of this section shall not apply to any marina, dock, or basin owned and operated by the federal government providing the facility is not regularly open to the general public."

STORMWATER MANAGEMENT EXEMPTIONS

517.2 (e): A land-disturbing activity is exempt from the requirements of Section 520 (Stormwater Management: Performance Requirements for Major Land Disturbing Activity), Section 522 (Stormwater Management: Performance Requirements for Major Substantial Improvement Activity) and Section 529 (Stormwater Management: Covenants and Easements) if it is conducted solely to reduce Combined Sewer Overflows (CSOs) in compliance with the court-approved consent decree.

Comment: We assume, this exception is made because these projects are not tied to new development or redevelopment projects, but are undertaken solely to reduce stormwater runoff from existing impervious areas responsible for current CSOs. In like manner, stormwater retrofits required by the MS4 permit in areas draining to the storm sewer system will not be tied to new development or redevelopment projects, but undertaken solely to reduce stormwater runoff from existing impervious areas to meet the Districts WIP.

Recommendation: Expand the exemption in 517.2 (e) to stormwater retrofits to the District storm sewer system required by the MS4 permit.

COVENANTS AND EASEMENTS

518.9 & 518.10: To receive project approval, the applicant must submit proof to DDOE that a SWMP, declaration of covenant and applicable easements have been filed at the District Recorder of Deeds.

529.1 (a) & (b): The owner of each lot/parcel that is part of a site where a major regulated project occurred must record at the District Recorder of Deeds a declaration of covenants that includes the on-site and off-site responsibilities stated in a DDOE approved SWMP and an easement to ensure DDOE access for BMP or land cover inspection and maintenance. However, an agency of District government shall not be required to record a declaration of covenants unless the District owned property is sold to a private owner or leased for a period of more than three years.

Comment: DoD lacks the authority to place such restrictions on DoD property. Covenants and easements are considered disposals of real property. Under the Federal Property and Administrative Services Act of 1949, as amended (Property Act), the General Services Administration was given the exclusive authority to manage the utilization of real property (40 U.S.C. §§ 471 et.

seq.) As property is defined as "any interest in land" within GSA regulations (41 C.F.R. §101-47.102.12(a)) this includes the placement of covenants and easements as set forth in this Rulemaking.

Recommendation: As DoD will not be able to comply with Sections 518.9-10 and Section 529, we request revision of Section 529.2 to include "of the Federal government" and state "An agency of the Federal government or District government shall not be required to make or record a declaration of covenants. . . ." This recognizes legal limitations of federal and DoD facilities with respect to recording restrictive land covenants. Further, the Stormwater Guidebook should be clarified to specifically state that covenants are not required on "government properties, defined as both federal and District-owned properties."

PERFORMANCE REQUIREMENTS FOR MAJOR SUBSTANTIAL IMPROVEMENT (MSI) ACTIVITY

In section 522.4, a MSI must achieve a stormwater retention volume (SWRV) equal to the 80th percentile rainfall event for DC (0.8 inch). In section 599, applicable definitions include:

- * Major Substantial Improvement - Substantial improvement activity and associated land disturbance activity, including such activities that are part of a common plan of development, for which the combined footprint of the improved building and land disturbing activity is $\geq 5,000$ sqft. A major substantial improvement activity may include a substantial improvement activity that is not associated with land disturbance.

- * Substantial Improvement - A repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds fifty percent (50%) of the market value of the structure before the improvement or repair is started.

- * Market Value of a Structure - Assessed value of the structure for the most recent year, as recorded in the real property assessment database maintained by the District of Columbia's Office of Tax and Revenue.

Comment: MSI projects usually occur in highly developed areas where there is little pervious area left or available for implementing BMPs. Although the SWRV has been reduced the area trigger for land disturbance is also reduced. More significantly, this provision effectively amounts to an additional stormwater retrofit requirement beyond that already required by the District under their MS4 permit for MSI projects where there is no increase in impervious area.

Recommendation: Remove this requirement unless adequate justification is provided that the added stormwater burden on

MSI projects is (1) necessary to meet water quality goals and (2) is not more cost effectively placed on another stormwater source sector.

STORMWATER MANAGEMENT MAINTENANCE

528.8: Used soil media removed from a BMP receiving drainage from an area intended for use or storage of motor vehicles shall not be re-used for planting or as fill material and shall be disposed of in a landfill or at a transfer station for transport to a landfill.

Comment: The soil media from a BMP may not be contaminated to the point it would not be suitable for fill material elsewhere. Testing the material to verify its suitability for fill would promote appropriate recycling and avoid unnecessary disposal costs.

Recommendation: Provide an option for testing used soil media to verify if it is suitable for use as fill.

IN-LIEU FEE

530.1. & 6: Indicates that the in-lieu fee payment will be used to increase stormwater retention in the District, specifically the cost of retaining one gallon of stormwater for one year.

Comment: It is unclear how this in-lieu fee relates to the stormwater fee that DDOE already requires District property holders to pay. According to the notice of final rulemaking for the stormwater fee, the purpose is to implement best management practices to prevent stormwater runoff from reaching the District streams and rivers. Both of these fees appear to charge for the same result and services.

Recommendation: Recognize the overlap between the two fees and reconcile the differences so that properties within the district are not being charged for the same services.

STORMWATER MANAGEMENT EXISTING RETENTION

534.1.1: A person may apply for certification of a Stormwater Retention Credit (SRC) for existing retention capacity that increased retention relative to prior conditions in the limited circumstance described in this section.

534.2(a): DDOE may certify an SRC for existing retention only if the BMP or land cover change providing the retention was installed or occurred after May 1, 2009.

Comment: We understand that May 1, 2009 was chosen as the cutoff date for credit since the Bay model run was run around that time and chosen as the baseline condition for Bay water quality upon which nutrient and sediment allocations were based. However, some in the regulated community, DoD in particular, has been retrofitting stormwater management of impervious areas by installing BMPs as far back as the early 2000's. The proposed 2009 cutoff for credit actually penalizes those that took a leadership role and stepped out ahead of the pack because any improvement in Bay water quality, as documented by the model run, would be credited to the entirety of the District's regulated community vice those that funded the improvement. In addition, the data used for that run was from sampling that occurred previously, possibly even in 2006, meaning that the actual modeled water quality condition was not representative of May 1, 2009. Therefore, at a minimum, the cutoff date for receiving any credit should be the date water quality data used in the model run was collected.

Recommendation: Allow older BMPs to be considered for SRC certification. A ratio of the storm size used for the design basis of the older BMP to the currently proposed design size in this ruling could be used as a basis for the percent credit available, or some other method of receiving partial credit could be devised.

SOIL EROSION AND SEDIMENT CONTROL APPLICABILITY

540.4: A person who applies for Department approval of a soil erosion and sediment control plan shall be the owner of the property where the activity is to take place.

Comment: DoD facilities may cover this requirement through the construction contract and have the contractor sign and submit the plan.

Recommendation: Allow the owner to designate an agent that could, on behalf of the owner, sign and submit the plan.